TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 392

UNITED STATES, PETITIONER

vs.

GEORGE E. SHIMER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1960
GRANTED NOVEMBER 14, 1960

Supreme Court of the United States

OCTOBER TERM, 1960

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1] **IN THE**
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 23909

UNITED STATES OF AMERICA

v.

GEORGE E. SHIMER

1. DOCKET ENTRIES

1/10/58 Complaint filed.
1/10/58 Summons exit.
1/28/58 Summons returned "on 1/20/58 served" and filed.
2/10/58 Stipulation and Order extending time for filing Answer filed. Noted 2/10/58.
2/21/58 Answer filed.
8/14/58 Plaintiff's Motion for judgment on the pleadings filed.
11/3/58 Argued sur Motion for judgment on the pleadings.
12/7/58 Opinion and Order, Welsh, J., denying plaintiff's Motion for judgment in the pleadings filed.
12/8/58 Note and notice mailed.
4/9/59 Defendant's Motion for summary judgment filed.
4/13/59 Stipulation of facts filed.
5/20/59 Argued sur defendant's Motion for summary judgment.
6/24/59 Order granting defendant's Motion for summary judgment.
6/24/59 Judgment in favor of defendant, and against plaintiff filed.
6/26/59 Note and notice mailed.
8/13/59 Notice of appeal by plaintiff filed—copy to Edward Davis, Esq. on 8/14/59.

[fol. 2] 8/13/59 Copy of Clerk's notice to United States Court of Appeals filed.

9/22/59 Motion for and Order extending time for filing and docketing appeal for 90 days from 8/13/59 filed.

9/23/59 Noted.

11/8/59 Record transmitted to the United States Court of Appeals.

[fol. 3] IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed Jan. 10, 1958

The plaintiff, the United States of America, by HAROLD K. WOOD, United States Attorney for the Eastern District of Pennsylvania, and JOHN A. ERICKSON, Assistant United States Attorney for the said district, complains of the defendant, George E. Shimer, and for cause of action alleges and says:

FIRST COUNT

1. The plaintiff being the United States of America, the Court has jurisdiction of this action pursuant to 28 U.S.C., 1345.

2. The defendant resides at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court.

3. The defendant, on or about the 12th day of January, 1948, procured a loan from the Excelsior Saving Fund and Loan Association, 33 West Main Street, Norristown, Pennsylvania, in the principal sum of $13,000.00, with interest at the rate of 4% per annum, payable at the rate of $78.78 monthly. Upon defendant's application, said loan was guaranteed to the extent of $4,000.00 by the Administrator of Veterans Affairs, pursuant to Section 500, Title III of the Servicemen's Readjustment Act of 1944, as amended, 59 Stat. 626 (38 U.S.C. 694).

4. The defendant defaulted in the payments of the monthly installments due on the said loan and, in accordance with the provisions of Section 506 of the cited Act (38 U.S.C. 694g), the Veterans Administration, on October 12, 1949, paid the Excelsior Saving Fund and Loan Association, the holder of the obligation, the sum of $4,000.00.

5. Upon payment of the sum aforesaid the plaintiff became subrogated to the rights of the holder to the extent of such payment.

6. Under Veterans Administration regulations (38 CFR 36.4323(e)), issued pursuant to Section 504 of the cited Act (38 U.S.C. 694d), defendant is liable for the amount so paid, which amount, less subsistence allowance

[fol. 4] set off, plus interest, results in his indebtedness to the United States as follows:

	Interest	Principal
Amount paid October 12, 1949, to the Excelsior Saving Fund and Loan Association, on D. O. Voucher No. 85590, accounts of P. J. Carney, symbol 403		$4,000.00
Interest through November 30, 1949, as computed by Veterans Administration	$ 23.56	
Interest from 12/1/49 to 6/30/50	92.89	
Less subsistence allowance 5/1/50 to 6/2/50, at $30.00 per month set off		32.00
		3,968.00
Plus interest at 4% per annum on $3,968.00 from 6/30/50 to 7/31/56	965.55	
Plus interest at 4% per annum on $3,968.00 from 7/31/56 to 10/15/57	191.79	
Total interest as of 10/15/57		1,273.79
Amount due as of 10/15/57		$5,241.79

Interest continues to accrue at the rate of 4% per annum on the unpaid principal balance of $3,968.00 from October 15, 1957, until paid.

7. Demand has been made upon the defendant for payment of the indebtedness and no part of the said sum has been paid.

SECOND COUNT

1. The plaintiff incorporates by reference in this Count the allegations of paragraph 1 to 5 inclusive of the First Count set forth above.

2. The defendant, George E. Shimer, is under legal obligation to reimburse the plaintiff, the United States of America, in the amount of $3,968.00, with interest at the rate of 4% per annum an the principal sum of $4,000.00 from the 12th day of October, 1949, until the 30th day of June, 1950, and interest at the rate of 4% per annum on the principal sum of $3,968.00 from the 30th day of June, 1950, until paid, under the provisions of the Servicemen's Readjustment Act of 1944, as amended, 38 U.S.C. 694, et seq., and Veterans Administration Regulation 36.4323

(e), promulgated under the authority of Section 694d of the said Act.

[fol. 5] WHEREFORE, plaintiff prays:

1. That, as holder of the note, the plaintiff have and recover of and from the defendant, George E. Shimer, under the First Count of its Complaint, the amount of $3,968.00 with interest on the principal sum of $4,000.00 at the rate of 4% per annum from the 12th day of October, 1949, until the 30th day of June, 1950, and interest at the rate of 4% per annum on the principal sum of $3,968.00 from the 30th day of June, 1950, until paid; that its costs in this action be assessed against the defendant, and that the plaintiff be granted all other relief to which it may be entitled.

2. In the alternative, that judgment be entered in favor of the plaintiff against the defendant, George E. Shimer, under the Second Count of its Complaint, for the sum of $3,968.00, with interest at the rate of 4% per annum on the principal sum of $4,000.00 from the 12th day of October, 1949, until the 30th day of June, 1950, and interest at the rate of 4% per annum on the principal sum of $3,968.00 from the 30th day of June, 1950, until paid; that its costs in this action be assessed against the said defendant, and that the plaintiff be granted all other relief to which it may be entitled.

Dated this 9th day of January, 1958.

UNITED STATES OF AMERICA,

By: /s/ HAROLD K. WOOD,
United States Attorney.

/s/ JOHN A. ERICKSON,
Assistant United States Attorney.

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER—Filed Feb. 21, 1958

FIRST COUNT

FIRST DEFENSE:

The plaintiff's Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE:

The defendant herein admits the averments of paragraphs 1, 2, 3 and 7 of the First Count of the Complaint.

THIRD DEFENSE:

The defendant denies that the Veterans Administration, on October 12, 1949, paid the Excelsior Saving Fund and Loan Association, in accordance with the provisions of Section 506 of the Servicemen's Readjustment Act of 1944, as amended, and that they became subrogated to the rights of the holder to the extent of such payment and that such payments resulted in any indebtedness on the part of the defendant to the United States. On the contrary defendant avers that the Veterans Administration paid the Excelsior Saving and Loan Association when no obligation existed on the part of the defendant or the Veterans Administration to make such payments. The mortgage premises was repurchased by the mortgagee without the mortgagee filing a petition under the Deficiency Judgment Act of the Commonwealth of Pennsylvania, Act of July 16, 1941, 12 PS, Section 2621.1 et seq

SECOND COUNT

FOURTH DEFENSE:

Defendant incorporates herein all the defenses asserted to the First Count and in addition thereto, avers that under the provisions of the Veterans Administration Regulations 36.4323 E there is no liability on the part of

either the defendant or the Veterans Administration as [fol. 7] long as the mortgagee has failed to comply with the Deficiency Judgment Act cited above.

WHEREFORE, the defendant herein prays that judgment be entered in his favor.

/s/ EDWARD DAVIS,
Attorney for Defendant.

[fol. 8] IN UNITED STATES DISTRICT COURT

4. MOTION OF PLAINTIFF FOR JUDGMENT ON THE PLEADINGS
Filed Aug. 14, 1958

Plaintiff moves the Court to enter judgment on the pleadings in favor of the plaintiff, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for the reason that the defendant in his answer has failed to state a defense against the claim of the plaintiff.

/s/ HAROLD K. WOOD,
United States Attorney.

/s/ DANIEL J. DIGIACOMO,
Assistant United States Attorney.

Dated: August 12, 1958.

[fol. 9] IN UNITED STATES
DISTRICT COURT

OPINION AND ORDER—December 17, 1958

WELSH, J.

The within complaint discloses the following facts:

On or about January 12, 1948, the defendant, George E. Shuner, procured a loan from the Excelsior Saving Fund and Loan Association, 33 West Main Street, Norristown, Pennsylvania, in the principal sum of $13,000.00, with interest at the rate of 4% per annum, payable at the rate of $78.78 monthly. Upon defendant's application, said loan was guaranteed to the extent of $4,000.00, by the Administrator of Veterans Affairs, pursuant to Section 500, Title III of the Servicemen's Readjustment Act of 1944, as amended, 59 Stat. 626 (38 U. S. C. 694). The defendant defaulted in the payments of the monthly installments due on the said loan, and the Administrator, on October 12, 1949, paid the Excelsior Saving Fund and Loan Association, the holder of the obligation, the sum of $4,000.00.

The complaint alleges that plaintiff paid the sum in accordance with the provisions of Section 506 of the Act (38 U. S. C. 694g) and alleges further that it is entitled to recover said sum (less subsistence allowance set off, plus interest) by virtue of its right of subrogation or indemnity under Veterans Administration Regulations (38 C. F. R. 36.4323(e)), issued pursuant to Section 504 of the Act (38 U. S. C. 694d).

In his answer defendant denies that the Administrator, on October 12, 1949, paid the Excelsior Saving Fund and Loan Association, in accordance with the provisions of Section 506 of the Servicemen's Readjustment Act of 1944, as amended, and that he became subrogated to the rights of the holder to the extent of such payment and that such payment resulted in any indebtedness on the part of the defendant to the United States. On the contrary, defendant avers that the Administrator paid the Excelsior Saving Fund and Loan Association when no obligation existed on the part of the defendant or the

[fol. 10] Administrator to make such payment. Defendant further avers that the mortgaged property was repurchased by the mortgagee, said mortgagee not having filed a petition to fix the fair market value of the property within six months of the sale, as required by the Deficiency Judgment Act of the Commonwealth of Pennsylvania, Act of July 16, 1941, 12 P. S. Section 2621.1 et seq.

Plaintiff has moved for judgment on the pleadings in favor of the plaintiff, pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. 723c et seq., for the reason that the defendant in his answer has failed to allege a valid defense against the claim of the plaintiff.

1. The pertinent provisions of the Deficiency Judgment Act are as follows:

> "2621.1 Whenever any real property has heretofore been or is hereafter sold, directly or indirectly, to the plaintiff in execution proceedings and the price for which such property has been sold was or is not sufficient to satisfy the amount of the judgment, interest and costs and the plaintiff seeks to collect the balance due on said judgment, interest and costs, the plaintiff or plaintiffs shall petition the court having jurisdiction to fix the fair market value of the real property sold as aforesaid. . . .
>
> 2621.6 . . . After hearing and the determination by the court of the fair market value of the property sold the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff to the extent of the fair market value of said property as previously agreed to by the plaintiff or plaintiffs or determined by the court, . . . and thereupon petitioner may proceed by appropriate proceedings to collect the balance of the debt.
>
> 2621.7 The plaintiff or plaintiffs shall file all petitions in accordance with section one and section two

[fol. 11] of this act not later than six months after the sale of any real property: . . . In the event no petition is filed within such period, the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff or plaintiffs."

2. To paraphrase the foregoing provisions of the Act it may be stated: (a) the aim of the Act is to protect debtors, obligors or guarantors by requiring a mortgagee, after a sale has resulted in a deficiency, to petition the court having jurisdiction to fix the fair market value of the real property sold and thereafter by limiting said mortgagee's right of collection to the balance of the debt in excess of the fair market value of the property; (b) to further protect debtors, obligors or guarantors, the Act discharges and releases them of liability to the mortgagee in the event said mortgagee fails to file a petition within six months.

3. If the cited Act is applicable in the instant case neither the defendant debtor nor the Administrator guarantor is liable to the mortgagee bank because of the bank's failure to petition for the fair market value of the property within six months of the sale as required by the Act. Needless to say, had the guarantor here been a private party instead of a public official the Act would clearly have been applicable.

Plaintiff's contention is that the Act is inapplicable because (a) its claim is based directly upon a federal statute and regulation and therefore its right of recovery cannot in any event be impaired by operation of state law and (b) this suit is not for a deficiency judgment, but for recovery under an independent contract of indemnity. United States v. Henderson, 121 F. Supp. 343, United States v. Gallardo, 154 F. Supp. 373, United States v. Jones, 155 F. Supp. 52 and McKnight v. United States, decided September 22, 1958, by the United States Court of Appeals for the Ninth Circuit.

We think that the contention is not persuasive under the circumstances of this case.

[fol. 12] 4. The Act does not impair the federal legislation guaranteeing loans such as that obtained by the defendant veteran here. The purpose of the federal legislation is to aid veterans in procuring home loans. The operation of the Pennsylvania Act does nothing to defeat that purpose. It does not prevent the bank from collecting any deficiency as does the California Act which was involved in McKnight v. United States, supra; it merely limits the mortgagee bank's right of recovery to the sum in excess of the fair market value of the property. We fail to perceive how such circumstances could defeat the purpose of the federal legislation or the rights of the mortgagee bank.

5. The independent contract of indemnity could have formed a legally sound basis for plaintiff's right to recover here had the Administrator made payment to the mortgagee bank when the defendant was under a legal obligation to the mortgagee bank. However, as it has been shown already, liability of the defendant to the mortgagee bank, if any, does not attach unless and until the mortgagee bank within six months of the sale of the property files a petition to fix the fair market value of the property. Since said bank did not file such petition no liability attached to the defendant mortgagor and no liability attached to the Administrator guarantor. His payment to the bank under such circumstances was improper.

Finally, the Administrator's own regulation, 38 C. F. R. 36.4323 (e), recognizes that only amounts he pays "on account of the liabilities" of a veteran constitute a debt owing to the United States by such veteran. Said regulation provides:

> "Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran."

6. We hold, therefore, that the Pennsylvania Deficiency Judgment Act is applicable in the instant case, and that alleging that the mortgagee bank failed to comply with [fol. 13] the provisions thereof is a valid defense to this suit. Plaintiff's motion for judgment under Rule 12c will accordingly be DENIED.

AND NOW, to wit, this 17th day of December, A. D., 1958, in accordance with the preceding opinion, it is ORDERED, ADJUDGE AND DECREED that plaintiff's motion for judgment under Rule 12c be and the same is hereby DENIED.

/s/ WELSH, J.

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT

Filed April 9, 1959

NOW COMES the Defendant, GEORGE E. SHIMER, by his attorney, EDWARD DAVIS, ESQUIRE, and moves this Honorable Court for summary judgment in his favor as provided by and under Rule 56-B of the Federal Rules of Civil Procedure on the ground that there is no genuine triable issue as to any material fact and that in view of the Opinion and Order of the HONORABLE GEORGE A. WELSH, dated December 17, 1958, denying Plaintiff's Motion for Judgment under Rule 12-DC, the Defendant is entitled to judgment herein.

/s/ EDWARD DAVIS,
Attorney for Defendant.

Dated April 8, 1959.

[fol. 15] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed April 13, 1959

AND NOW, to wit: this 13th day of April, 1959, it is hereby Stipulated and Agreed by and between counsel for plaintiff, HAROLD K. WOOD, United States Attorney in and for the Eastern District of Pennsylvania, and DANIEL J. DiGIACOMO, Assistant United States Attorney for said District, and counsel for defendant, EDWARD DAVIS, Esquire, and SHELDON TABB, Esquire, that the following are admitted facts:

1. On January 12, 1948, the defendant, George E. Shimer, obtained a loan of $13,000.00 from the Excelsior Saving Fund and Loan Association to purchase residential realty situate in Whitemarsh Township, Montgomery County, Pennsylvania.

2. The loan was to be repaid with interest at 4% per annum in monthly installments of $78.78 over a term of twenty years, as evidenced by a bond and secured by a mortgage on the property purchased, executed by George E. Shimer and Mildren F. Shimer, his wife, to the Excelsior Saving Fund and Loan Association, on the same date.

3. On February 6, 1948, George E. Shimer, the defendant, an eligible veteran, applied to the Administrator of Veterans Affairs for guaranty of said loan pursuant to the provisions of Title III of the Servicemen's Readjustment Act of 1944 as amended, on VA Form 4-1820, Home Loan Report", a photostatic copy of which is attached hereto and marked Exhibit A.

4. The Veterans Administration approved the Home Loan Report and the application for guaranty, and on February 11, 1948 issued VA Form 4-1899 "Loan Guaranty Certificate", guaranteeing "Subject to the Servicemen's Readjustment Act of 1944, as amended, Public Law 268, 79th Congress, and the regulations issued thereunder to the date of this certificate, 37.38 percent of the indebtedness outstanding from time to time under the loan

identified above", which for the $13,000.00 loan was $4,000.00.

5. Shimer defaulted on May 12, 1948, continued in default, and on April 12, 1949, the Excelsior Saving Fund [fol. 16] and Loan Association filed "Notice of Intention to Foreclose" with the Veterans Administration, and thereafter on May 12, 1949 entered judgment in the Court of Common Pleas of Montgomery County, Pennsylvania, against George E. Shimer and Mildred F. Shimer, his wife, to No. 351 April Term 1949, to foreclose the mortgage on the property purchased with the loan.

6. At the Sheriff's sale, June 29, 1949, the property was purchased by the Excelsior Saving Fund and Loan Association for a bid of $250.00.

7. On July 8, 1949, the Excelsior Saving Fund and Loan Association filed a claim with the Administrator of Veterans Affairs for payment of the loan guaranty—$4,000.00. The Administrator of Veterans Affairs paid this amount to the Association October 7, 1949.

8. The Excelsior Saving Fund and Loan Association sold the aforementioned property on September 8, 1949 to William D. and Jeanne E. Bjorestek for $10,500.00.

9. The Excelsior Saving Fund and Loan Association did not comply with the provisions of the Deficiency Judgment Act of the Commonwealth of Pennsylvania, Act of 1941, July 16, P.L. 400, Section 1, 12 Purdons, Section 2621.1, etc.

/s/ HAROLD K. WOOD,
United States Attorney.

/s/ DANIEL J. DIGIACOMO,
Assistant United States Attorney.
Counsel for Plaintiff.

/s/ EDWARD DAVIS, Esquire,

/s/ SHELDON TABB, Esquire,
Counsel for Defendant.

(Here follow 2 charts, Home Loan Report)

HOME LOAN REPORT

☒ ORIGINAL — PHOTO CONFIRMATION

TO VETERANS ADMINISTRATION (Attn. Loan Guar. Div.)

To be used only by supervised lending institutions for reporting a loan made or to be made for guaranty or insurance. Make out in duplicate, original to be forwarded to the Veterans Administration Loan Guaranty Div., duplicate to be retained by lender. DO NOT USE TO REPORT A FARM OR BUSINESS LOAN

VA LOAN NO.

I. H

☐ Guarantee ☐ Insurance DATE

This statement of the undersigned lender is made pursuant to section 500 of title III of the Servicemen's Readjustment Act of 1944, as amended, Public Law No. 346, 78th Congress, and there is transmitted herewith:

(Check only the applicable forms or papers being forwarded in accordance with procedure for the type of loan being reported)

☐ Original honorable discharge ☐ Escrow or other agreement ☐ Other (Specify)

☐ Other original separation papers ☒ Appraisal report VA Form 1805

☒ Certificate of eligibility VA Form 1870 ☐ Note or other evidence of indebtedness

VETERAN'S NAME (Last, first, middle name)

Shimer, George E.

SERIAL NO.

33 982 184

☒ Army ☐ M C ☐ Navy ☐ C G

FOR VA USE

ADDRESS

Righter Street, Conshohocken, Pa.

DATE OF BIRTH

May 30, 1915

AMOUNT AND TERMS OF LOAN

AMT. OF LOAN

13,000.

DATED

1-12-48

PAYABLE

$ 78.78

PER

month

FOR (No. of)

20 yrs.

MOD.

INCL. INT. AT

4 % per annum

☒ Term loan

PAYABLE (No. of)

20 yrs.

% PER ANNUM

4

INTEREST PAYABLE

monthly

☐ Secured ☐ Unsecured

BY MORTGAGE ☐ 1st ☐ 2d ☐ 1st chattel

If note is payable under terms other than provided for above, attach supplemental statement

If lien is other than provided for above, explain

DESCRIPTION OF PRIMARY LIEN

If the above loan is made pursuant to section 505 "A" or for repairs, alterations and improvements subject to a primary loan, fill in the following:

HELD OR MADE BY

ADDRESS

AMOUNT

INTEREST

% per annum

TYPE

FOR

YRS

MOS

PAYABLE

INSTALLMENTS

PER

$

NO. AMORT'N OF ANY SUPERIOR MORTGAGE OR CHARGE HELD BY HOLDER OF THIS LOAN

LOCATION AND LEGAL DESCRIPTION OF PROPERTY

LOCATION OF THE REAL PROPERTY TO SECURE THE LOAN

Righter Street, Conshohocken, Montgomery County, Pa.

LEGAL DESCRIPTION OF REAL PROPERTY AS IT APPEARS IN THE MORTGAGE OR OTHER INSTRUMENT SECURING THE LOAN

BEGINNING at a point on the northwesterly side of Righter Street at the distance of sixty four and two hundredths feet southwesterly from the southwesterly side of Thirteenth Avenue, being a corner of Lot No. 361 on said plan; thence extending along said northwesterly side of said Righter Street, southwestwardly one hundred feet to a corner of lot No. 358 on said plan; thence extending along said lot No. 358, northwestwardly one hundred feet to a corner of land known as Leeland Park; thence extending along said land northeastwardly one hundred feet to a point a corner of Lot No. 361, aforesaid; thence extending along said Lot No. 361, southeastwardly one hundred feet to the first mentioned point and place of beginning.

RECEIVED

FEB 9 1948

FOR REAL ESTATE LOAN THE VETERAN'S ESTATE IN THE SUBJECT PROPERTY IS AS FOLLOWS (Refer to section 700 of the Regulations)

In fee simple

PURPOSE OF LOAN

THE LOAN WAS ☐ WILL BE MADE PURSUANT TO SECTION 501 FOR THE FOLLOWING PURPOSES for a home.

(If loan is closed pursuant to section 507 for refinancing delinquent indebtedness this report must be supplemented with Form ... Report Delinquent Indebtedness)

Regulations issued under the act, and in effect on the date of any loan which is submitted and accepted or approved for a guaranty or for insurance thereof, govern the rights, duties and liabilities of the parties to such loan and any provisions of the loan instruments inconsistent with such regulations are hereby deemed to be modified thereto. (Section 4(h) of the Regulations)

VA Form 1800

CERTIFICATION

The Undersigned Lender Certifies

(1) The proceeds of such loan (will be) (has been) used for payment of the property purchased or constructed or [illegible] as follows:

DISBURSEMENTS		
1 Seller or contractor	$ 2159.24	$
2 Existing liens	10633.00	
3 Total Cost (1 plus 2)		$ 12792.24
4 Taxes 1946 1947	29.76	
5 Fire insurance, premium 5 yrs. $21000.	147.00	
Amount $		
6 Other insurance, premium	none	
Amount $		
7 Fees Appraisal	15.00	
8 Inspection	none	
9 Misc. [illegible]	15.00	
10 Total Expenses (4 through 9)		$ 207.76
11 Total (3 plus 10)		$ 13000.00
12 Loan credit or other credit	none	
13 Primary loan (If any)	none	
14. Amount of loan for guaranty or insurance		13000.00

(The following sections must be checked)

☒ (2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses, and that the nature and condition of the property is such as to be suitable for dwelling purposes, and

☒ (3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, alterations, or improvements does not exceed the reasonable value thereof as determined by proper appraisal dated Dec. 15, 1947 (appraisal must be made within 6 months prior to date of loan), made by Louis S. Rockett an appraiser designated by the Administrator (appraisal attached)

☒ (4) That the undersigned is a qualified lender as specified in section 500 (d) of the act

☐ (5) That the mortgage or other security instrument (will be) (has been) filed or recorded in accordance with the law of the State in which the property is located, and

☒ (6) There has been no default on the loan up to and including the date of this report.

(Check this section if applicable.)

☒ 7. That there (will be) (has been) ☒ escrowed $ 300.00 or ☐ earmarked $ _____ of the proceeds of the loan for future disbursement subject to section 4303 (c) of the Regulations

The Administrator of Veterans' Affairs is requested to issue ☒ Loan Guaranty Certificate, or ☐ endorse evidence of guaranty on the note or other evidence of indebtedness, or ☐ Certificate of Insurance Credit (*VA Form No. 1871*), and, an amount equivalent to 4 percent of the amount guaranteed (or insured) to be paid to the undersigned lender for credit upon the loan

(IF A CORPORATION)	LENDER
ATTEST	The Excelsior Saving Fund and Loan Association
Impress Corporate Seal only if required by law	BY
	ADDRESS 33 W. Main St., Norristown, Pa.

Federal Statutes provide severe penalties for any fraud, intentional misrepresentation or criminal connivance or conspiracy purpose to influence the issuance of any guaranty or insurance by the Administrator hereunder.

MUST BE SIGNED BY VETERAN

a. I declare that I do not have an application pending for a loan for the purpose stated herein.

b. I previously have used my guaranty benefit for other loan or loans as follows: $ none for real estate, $ none for nonreal estate

I request the Administrator to endorse my honorable discharge or certificate of eligibility for $ 4000.00 of the guaranty benefit available to me

DATE	SIGNATURE OF VETERAN
Oct. 1, 1948	[signature]

FOR USE BY VETERANS ADMINISTRATION

REPORT APPROVED ☐ REPORT DISAPPROVED DATE

ISSUE GUARANTY IN AMOUNT OF $ EQUIVALENT TO % OF LOAN

CREDIT LENDER'S INSURANCE ACCOUNT WITH $ EQUIVALENT TO % OF LOAN

(Signature of authorized agent)

VA FORM 4-1820 (BACK)

[fol. 17] IN UNITED STATES
DISTRICT COURT

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—June 24, 1959

AND NOW, to wit, this 24 day of June, A. D., 1959, a stipulation of facts having been filed, it is ORDERED that defendant's motion for summary judgment under Rule 56 (b) be and the same is hereby GRANTED for reasons that appear in this Court's opinion dated December 17, 1958, denying plaintiff's motion for judgment under Rule 12 (c).

/s/ GEORGE A. WELSH,
Judge.

[fol. 18] IN UNITED STATES
DISTRICT COURT

NOTICE OF APPEAL—Filed Aug. 13, 1959

Notice is hereby given that the UNITED STATES OF AMERICA, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the United States District Court for the Eastern District of Pennsylvania entered on June 24, 1959, granting judgment in favor of the defendant and against the plaintiff.

/s/ HAROLD K. WOOD,
United States Attorney.

/s/ DANIEL J. DiGIACOMO,
Assistant United States Attorney.

[fol. 19] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,067

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE E. SHIMER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 18, 1960

Before BIGGS, *Chief Judge*, and STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT—Filed April 8, 1960

By STALEY, *Circuit Judge*.

Is the amount the Veterans Administration can recover on its contract of indemnity with a Pennsylvania veteran limited to the amount which the veteran owes his mortgagee at foreclosure, and must that amount be computed in accordance with Pennsylvania law, including the Pennsylvania Deficiency Judgment Act?[1]

The facta as taken from the stipulation entered into by the parties are as follows: Appellee, George E. Shimer, obtained a loan of $13,000 from the Excelsior Saving Fund and Loan Association (Association) on January 12, 1948, [fol. 20] to purchase residential realty in Whitemarsh Township, Montgomery County, Pennsylvania. The loan was evidenced by a bond and secured by a mortgage on

[1] 12 Purdon's Pa. Stat. Ann. § 2621.1 et seq.

the property issued to the Association on the same date, January 12, 1948, both having been executed by George E. and Mildred F. Shimer, his wife. The loan was to be repaid with interest at 4 per cent per annum in monthly installments of $78.78 over a term of twenty years. Within a month appellee, an eligible veteran, applied to the Veterans Administration (V.A.) for guaranty of said loan pursuant to the provisions of Title III of the Servicemen's Readjustment Act of 1944, as amended, 59 Stat. 626, 38 U.S.C. § 694, et seq. (now 38 U.S.C. § 1801 et seq.), on V.A. Form 4-1820, "Home Loan Report" Shortly thereafter, on February 11, 1948, the V.A. approved the application and issued V.A. Form 4-1899, "Loan Guaranty Certificate," guaranteeing "subject to the Servicemen's Readjustment Act of 1944, as amended, Public Law 268, 79th Congress, and the regulations issued thereunder to the date of this certificate, 37.38 per cent of the indebtedness outstanding from time to time under the loan identified above." Pursuant to the provisions as applied to this $13,000 loan, the guaranty amounted to $4,000. Appellee defaulted on May 12, 1948, and continued in default. On April 12, 1949, the Association filed a Notice of Intention to Foreclose with the V.A., and on May 12, 1949, entered judgment in the Court of Common Pleas of Montgomery County, Pennsylvania, at No. 351, April Term, 1949, to foreclose the mortgage on the property purchased with the loan. Sheriff's sale followed on June 29, 1949, where the property was purchased for $250 by the Association. The Association thereupon filed a claim with the V.A. for payment of the $4,000 loan guaranty on July 8, 1949, and the V.A. paid this amount on October 7, 1949. While this claim was pending before the V.A., the Association sold the property to third parties for $10,500. At no time did the Association comply with the provisions of the Pennsylvania Deficiency Judgment Act.

[fol. 21] This action was initiated in the District Court for the Eastern District of Pennsylvania by the United States to recover the sums paid by the V.A. to the Association. The government asserted it was entitled to recover under either of two counts. The first count was

based on its rights as a subrogee of the Association,[2] and the second count was based on a right of indemnity. An answer was filed by the appellee alleging that no obligation existed under either theory inasmuch as the mortgagee after it purchased the property at judicial sale had failed to file a petition to fix the fair market value of the property pursuant to the Pennsylvania Deficiency Judgment Act. The government thereafter filed a motion for judgment on the pleadings which was denied by the district judge in an opinion issued December 17, 1958. The parties entered into a stipulation of facts, and the district court thereafter granted appellee's motion for summary judgment on June 24, 1959, under Rule 56(b).

On appeal the government contends that it is entitled to indemnity for the loss which it suffered as guarantor of the loan on the basis of a valid regulation binding upon the appellee that is not impaired or limited in any way by the provisions of Pennsylvania law concerning deficiency judgments. The government asserts that "the court below has grafted onto the rights and liabilities running between the United States and defendant [appellee] in their independent contract of indemnity, state law considerations *which have point only respecting the relationship between defendant and the bank in the first instance,* or secondarily between the defendant and the bank's subrogee. We think it clear that state law control of this latter relationship can affect only those rights which the subrogee takes through the bank, and can not affect other rights independently transacted." (Emphasis supplied.)

We agree with the government that an independent indemnity relationship was created by the veteran's ap- [fol. 22] plication for guaranty of his loan. We further agree that the terms of that guaranty are governed by the Servicemen's Readjustment Act of 1944, as amended, (Veterans Act) and the regulations promulgated pursuant thereto. Although Section 506 of the Act, 38 U.S.C.

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[2] The government has evidently abandoned its claim as subrogee, for in its appeal it has not raised that issue.

(1952 ed.) § 694g, entitled "Procedure on default," authorizes payment of the guaranty by the V.A. in the case of each and every default, it does not purport to spell out the amount which is to be paid; it merely refers to the guaranty. The House Report of the Committee of Conference, dated December 17, 1945, U.S. Code Cong. Serv., 79th Cong., 1st Sess. (1945), 938-939, in considering the procedure on default, stated that "In the event the veteran defaulted in payment of his loan and after suit on foreclosure and sale *the deficiency was determined*, then upon notification from the lender, the Administrator would pay to the lender its guaranty not in excess of $2,000 and not in excess of *the deficiency*, and be subrogated to the rights of the lender to the extent of the amount paid on the guaranty." (Emphasis supplied.)[3]

An examination of the Act fails to disclose any attempt on the part of Congress to supplant state law for determining the amount of the deficiency on the loan between the mortgagor and the mortgagee, which deficiency, up to the statutory limit, is the amount and the only amount which may be paid by the V.A. under the guaranty. The regulations promulgated under the Act make it equally clear, as we later demonstrate, that state law was intended to be followed in determining the amount of the indebtedness to which the guaranty related.

Although the government concedes, as we have heretofore noted, that state law applies to the basic indebtedness between the mortgagor and the mortgagee, it maintains that state law does not apply to the indemnity agreement between the veteran and the government. It seemingly asserts that it can recover under the indemnity [fol. 23] agreement whatever amount it paid to the mortgagee. The amount payable under the indemnity agreement, however, is limited to the amount which the V.A. under the statute is *required* to pay on its guaranty and not the amount which it actually pays. As we have indicated, the amount which it is legally required to pay

[3] The Senate Bill was substituted for the House Bill; however, on page 940 of the same report, it is stated: "Section 506, relating to procedure on default, is retained substantially as in the House Bill."

is the deficiency on foreclosure. That deficiency represents the then indebtedness between the mortgagor and the mortgagee.

The government principally relies on a regulation, since modified, which stated that "Any amounts paid to the creditor by the Administrator pursuant to the guaranty shall constitute a debt due to the United States by the veteran on whose application the guaranty was made * * *." 38 Code Fed. Regs. (1944 Supp.) § 36.4043. This is hardly persuasive, for that regulation was modified to read "Any amounts paid by the Administrator *on account of the liabilities* of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." 38 Code Fed. Regs. (1949 ed.) § 36.4323(e). In any case, even under the earlier regulation the amounts to be paid were regulated by the guaranty, and this was intended only to reimburse the mortgagee in an amount not to exceed the loss he might suffer through default computed as of the date of foreclosure. See 38 Code Fed. (1956 rev.) § 36.4320(a)(3)(iii) and (4)(d). Since the section in the regulations upon which the government relies, i.e., 38 Code Fed. Regs. (1949 ed.) § 36.4323(e), refers to the "liabilities of any veteran" (to the mortgagee) and the entire Veterans Act refers to an underlying obligation created by state law, we are convinced that federal law requires a referral to the state law in this instance.

In addition, Section 36.4321, entitled "Computation of guaranty claims; subsequent accounts," specifically indicates such a procedure in subsection (a), for it provides:

"Subject to the limitation that the total amounts payable shall in no event exceed the amount origi-
[fol. 24] nally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure * * *. *Deposits or other credits or set-offs legally applicable to the indebtedness* on the date of computation *shall be applied in reduction of the indebtedness* on which the claim is based. Any escrowed or

earmarked funds not subject to superior claims of third persons must likewise be so applied." (Emphasis supplied.)[4]

Certainly, one must refer to state law to discover what credits or set-offs are legally applicable to the indebtedness between the mortgagor and the mortgagee. In the instant case where Pennsylvania law is applicable, including the Pennsylvania Deficiency Judgment Act, on the critical date, the date of judgment or of decree of foreclosure, the appellee had a set-off or credit. The Pennsylvania law provides that where the mortgagee purchases the property at foreclosure, the fair market value of the property must be applied against the debt.[5] It also pro-

[4] If this or any other regulation issued by the Administrator be interpreted to deny to the veteran-mortgagor the defense of payment to the mortgagee either partial or complete such regulation would be invalid as being contrary to the Act. See 38 U.S.C. (1952 ed.) § 694(b), presently codified in 38 U.S.C. (1958 ed.) § 1803(b), (c) and (d).

[5] In Sophia Wilkes Bldg. & Loan Ass'n v. Rudloff, 348 Pa. 477, 35 A.2d 278 (1944), it was stated:

"'* * * * The act, recognizing plaintiff's right to recover the full amount of the judgment, merely provides for an inquiry in regard to a transaction which occurred subsequent to the judgment, to wit, [what occurred at] the sheriff's sale, in order to ascertain what amount of payment plaintiff has received, such an inquiry being analogous to the trial of an issue of payment raised as a defence * * *.'" 35 A.2d at page 280.

"* * * [T]he defendant is entitled to have the judgment against him satisfied of record, for it has been discharged as completely and effectually as if it had been actually paid off in cash." 35 A.2d at page 280.

"We merely recognize and give effect to the repayment of the judgment debt which the plaintiff has already received through his purchase at the sheriff's sale of a property of the defendant which is now presumed in law to have been worth the full amount of the judgment." 35 A.2d at page 281.

"It was the receipt of a property worth the amount of the judgment which discharged it. The Deficiency Judgments Act merely compelled effect to be given to that fact. We do not know, nor do we think it important, whether the property was actually worth the full amount of the judg-

[fol. 25] vides a method of determining fair market value. If the mortgagee considers the fair market value to be less than the debt he may have appraisers appointed to have the amount fixed. In effect, the mortgagor is given a legal credit or set-off against the amount of indebtedness owing the mortgagee to the extent of the fair market value of the security which the mortgagee has obtained.[5] Thus this squarely brings the present case within the regulation cited above.

The second string to the government's bow is the administrative decision rendered in 1945 by the Administrator of Veterans' Affairs, 1 Decisions of Administrator of Veterans' Affairs No. 625, pp. 1154-1164 (Jan. 22, 1945). Basically, this administrative opinion is concerned with states where the mortgagee is completely barred from proceeding against the mortgagor even for an actual deficiency in the event of default. It is worthy of note that Pennsylvania does not do so, but merely limits the recovery by the mortgagee to the amount of the actual deficiency after giving credit for the fair market value of the property taken over by the mortgagee. We agree with the opinion insofar as it asserts that Congress intended the Veterans Act to be beneficial to veterans throughout the country. Of course, in those states where no deficiency judgments are permitted and thus the mort-

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ment. It may be assumed that it was, for, if it was not, the plaintiff would have moved, before the expiration of the period of limitation prescribed by the Act, to have a lesser value fixed for the property. However that may be, the Act itself has now created a conclusive presumption that the property was worth at least one hundred percent of the judgment." 35 A.2d at page 281.

In accord, Union Trust Co. of New Castle v. Tutino, 353 Pa. 145, 44 A.2d 556 (1945); Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Scott, 346 Pa. 18, 29 A.2d 328 (1942).

[5] If the property had been purchased by a third party at the sale, resulting in the receipt by the mortgagee of an amount of cash equal to or in excess of the amount of the debt, the Administrator could hardly claim that the veteran could not raise the defense of payment in full in an action brought against him on his indemnity contract.

gagee is completely deprived of its right to collect the full amount of indebtedness, the Act would be ineffectual. In such cases the state law must be presumed to be inapplicable. However, if the Administrator's decision be [fol. 26] interpreted as providing that all state laws for the determination of the actual amount of the indebtedness existing at the time of foreclosure are superseded, we must emphatically disagree. We find nothing in the Veterans Act that would lead us to that conclusion and much that convinces us that Congress never intended to deprive veteran-mortgagors of the benefits of Acts such as the Pennsylvania one that is clearly ameliorative. Certainly there was no intention to put these individuals in a worse position than nonveteran-mortgagors.

The V.A. also relies upon the case of McKnight v. United States, 259 F.2d 540 (C.A. 9, 1958). It claims that case holds that all state laws upon the subject of deficiency judgments are superseded by the Veterans Act. There the court held that it need not determine whether the California Deficiency Judgment Act applied because under settled principles of mortgage law, "the value of the mortgagor's equity in the mortgaged property is fixed by the amount bid at the foreclosure sale, and * * * in the absence of fraud, a mortgagor has no right to compel the mortgagee to account to him for any profit made upon a subsequent resale of the premises." 259 F.2d at page 544.[7] With this we agree. The case merely stands for the proposition that the amount of the liability of a veteran to the United States is fixed at the time of foreclosure and that subsequent sales of the property can neither decrease nor increase this liability: There is no

[7] Four district court cases, which treat the problem rather summarily, are in accord with the government's position. United States v. Ryder, 168 F. Supp. 263 (N.D. Ga. 1958); United States v. Jones, 155 F. Supp. 52 (M.D. Ga. 1957); United States v. Gallardo, 154 F. Supp. 373 (N.D. Calif. 1957); United States v. Henderson, 121 F. Supp. 343 (S.D. Iowa, 1953). None of these cases involved a statute such as that in the instant case, and more particularly none considered how the guaranty was to be computed. Rather they assumed that the payment by the government to the mortgagee was authorized under the statute and regulations.

holding in the case that the amount received by the mortgagee at foreclosure is determined by federal law, and that, of course, is what we must determine in this case.

One other aspect of the Pennsylvania Act deserves our attention. It provides that if no action is taken within [fol. 27] the six-month period, not only is the indebtedness to the mortgagee satisfied but the obligor, *guarantor*, or anyone else liable directly or indirectly to the mortgagee is released. This strikingly points up the difference between the Pennsylvania and California Acts, for the latter has been held not to apply to guarantors. Security-First National Bank of Los Angeles v. Chapman, 41 Cal. 2d 219, 106 P.2d 431 (1940).

The government's contention that it paid the entire amount of its guaranty prior to the end of the six-month period leads once again to the central question. On what basis did it compute the indebtedness of the mortgagor to the mortgagee so that the amount to be paid under the guaranty, in accordance with the statute and regulations, could have been ascertained? Until the mortgagee indicated, by taking steps under the Pennsylvania Act that it was not satisfied that the fair market value of the property which it then held[8] was at least equal to the indebtedness, there was no way of calculating any liability of the veteran and in turn any liability of the government on its guaranty. In the absence of such action on the part of the mortgagee within the six-month period, its claim against the veteran was fully satisfied by the security and the guarantor (V.A.) was released.

The judgment will be affirmed.

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[8] It must be remembered that the mortgagee is not forced or required to bid in the property, in which event the amount bid by the third party would be credited on the debt.

[fol. 28] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,067

UNITED STATES OF AMERICA, APPELLANT

vs.

GEORGE E. SHIMER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, Chief Judge, and STALEY and HASTIE, Circuit Judges.

JUDGMENT—April 8, 1960

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

April 8, 1960

(File Endorsement Omitted)

[fol. 29] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 30] SUPREME COURT OF THE UNITED STATES

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 30, 1960

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be and the same is hereby, extended to and including August 22, 1960.

/s/ William J. Brennan Jr.
Associate Justice of the Supreme Court of the United States.

Dated this 30 day of June 1960.

[fol. 31] SUPREME COURT OF THE UNITED STATES

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 18, 1960

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6th, 1960.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States.

Dated this 18th day of August 1960

[fol. 32] SUPREME COURT OF THE UNITED STATES

No. 392, October Term, 1960

UNITED STATES, PETITIONER

vs.

GEORGE E. SHIMER

ORDER ALLOWING CERTIORARI—November 14, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 33] SUPREME COURT OF THE UNITED STATES

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ORDER GRANTING MOTION OF RESPONDENT FOR LEAVE TO PROCEED IN FORMA PAUPERIS—NOV. 14, 1960

ON CONSIDERATION of the motion of the respondent for leave to proceed *in forma pauperis* in this case,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

November 14, 1960

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